

Supreme Court, U. S.  
FILED

OCT 6 1978

MICHAEL RODAK, JR., CLERK

---

IN THE  
SUPREME COURT OF THE UNITED STATES

*October Term, 1978*

---

No. 78-54

---

JAMES L. KEENER, *Petitioner*

vs.

STATE OF KANSAS, *Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF KANSAS

SUPPLEMENTAL BRIEF FOR PETITIONER  
CALLING ATTENTION TO INTERVENING MATTERS

---

Levi H. Goossen  
224 East 7th, P.O. Box 725  
Newton, Kansas 67114  
(316) 283-3628

*Attorney for Petitioner*

James W. Modrall  
Harvey County Courthouse  
Newton, Kansas 67114

Curt T. Schneider  
Kansas Attorney General  
Kansas Judicial Center  
301 West Tenth  
Topeka, Kansas 66612  
*Attorneys for Respondent*

---

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1978

---

No. 78-54

---

JAMES L. KEENER, Petitioner,

vs.

STATE OF KANSAS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF THE STATE OF KANSAS

SUPPLEMENTAL BRIEF FOR PETITIONER  
CALLING ATTENTION TO INTERVENING MATTERS

On September 5, 1978, the Judicial Administrator, who is the Indigent Fund administrative and disbursing agent acting for the State of Kansas, entered another judgment without a hearing, on behalf of and in favor of the State of Kansas, for the state's expenditures for the services of court appointed counsel on appeal, this time for \$2,801.37. The judgment is similar in form to Appendix F attached to the Petition for Writ of Certiorari. This judgment, like the previous judgments, was based on expenditures which would never have been incurred had it not been for the unlawful prosecution in violation of Articles IV (e) and V(c) of the Interstate Agreement on De-

tainers, 18 U.S.C., App. Interstate Agreement on Detainers (1970) and the Federal Civil Rights Act, 42 U.S.C. §1983. The entry of this judgment is clear independent state action ratifying the unlawful prosecution because it was entered by the Judicial Administrator, an employee of the Kansas Supreme Court, almost four months after the Kansas Supreme Court holding that the prosecution had been barred and almost two months after the Petition for Certiorari was filed and served upon the Kansas Supreme Court as shown by the files and records of this Court, all this without waiting for any action or rulings from this honorable Court.

Thus, despite the fact that the Judicial Administrator knew of the decision of the Court below, which amounted to a finding that the prosecution was unlawful, and despite notice that the issue was being raised before this Court, he took affirmative action to enter a judgment against the petitioner, putting the State of Kansas in a position to avail itself of the benefits thereof even though the expenditures represented by the judgment were caused solely by the unlawful prosecution. The point is that, even though the Judicial Administrator knew of the lower court finding dismissing the unlawful prosecution, he entered judgment anyway on a claim that existed solely because of that unlawful prosecution and even while a Petition for Writ of Certiorari was on file in this Court. Any state attempt to avail itself of any benefit from an unlawful act of any of its agents or any attempt to recover for something caused by the act, from a victim of that act, is a ratification. Thus, the highest judicial administrative official of the State of Kansas, acting on behalf of the state, has ratified the prosecution. In Olmstead v. United States, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1928) at page

483, Mr. Justice Brandeis in his dissent set forth the essence of ratification as follows:

When the government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officer's crimes. [citing cases] And if this court should permit the government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification.

This statement applies here, notwithstanding its reference to "officers' crimes", for in the last analysis, federal constitutional and statutory rights cannot be made to depend on local state designations of what conduct should or should not be made subject to criminal sanctions. The important factor is that the prosecution here was conducted in the face of a statutory bar, contrary to both state and federal law.

This Court has never ruled on the question of what constitutional consequences flow from maintaining an unlawful prosecution. Petitioner's position is that an unlawful prosecution must stop dead in its tracks. Anything less must surely be a due process violation if a clear unlawfulness is present and is promptly called to the attention of the prosecutor and the Court, as was done in this case. Otherwise the prosecution receives a license to try to coax and cajole the defense into waiving defects or maneuvering the defense into "catch 22" situations. The danger of incurring a waiver in the course of a criminal defense is great, and state trial and appellate Courts are prone to search them out as justifications for up-

holding convictions. Due process surely does not permit the Court to allow the prosecution to promote defense mistakes in an unlawful prosecution or take advantage of the occurrence of some future inadvertent waiver for later use to justify affirmation of the conviction. These situations always present serious due process questions but those questions can seldom be raised because if the case is reversed, it will be on other grounds leaving the due process argument moot, and if affirmed it will be predicated on waiver, in which case the defendant generally finds himself in no position to assert it as a practical matter. Mr. Justice Holmes, at page 470 in his dissent in Olmstead v. United States, *supra*, reasoned that "... no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business, it does not permit the judge to allow such inequities to succeed."

Just as this Court acted affirmatively in Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S. Ct. 1684 (1961) to end illegal searches by making them unprofitable, so this Court should now act to make unlawful prosecutions unprofitable because they are not only a violation of a defendant's rights, they are a misuse of the judicial system.

This case is a glaring example of how some Courts have felt at liberty to ignore the standards of Fuller v. Oregon, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974) even in extreme situations. There is rather surprising justification for this position because this Court in Fuller, in affirming, simply approved that particular Oregon recoupment law, but it did not state the negative of what such statutes cannot provide, nor did it state that the provisions of that statute ex-

pressed minimum constitutional standards. The Court below therefore ignores that case completely, in effect taking the position that it does not express standards by which the validity of recoupment laws are to be measured. Other more enlightened decisions hold that Fuller did establish recoupment standards. United States v. Santarpio, 560 F.2d 448 (1st Cir. 1977); People v. Amor, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974); Stroinski v. Office of Public Defender, 134 N.J. Super. 21, 338 A.2d 202 (1975); Commonwealth v. Opara, 362 A.2d 305 (1976). Even by this view, the standards in any given case are of uncertain applicability deductible from the Fuller case only by negative inference. Thus, while the Fuller case has had an influence on some courts, it has been ineffective in curbing abusive recoupment attempts, as this case illustrates.

The prevailing view in Kansas is that the legislative elimination of the discriminatory denial of exemptions (Kansas Session Laws, 1976, ch. 169, §3) eliminates all constitutional defects even though this Court in James v. Strange, 407 U.S. 128, 32 L.Ed.2d 600, 92 S.Ct. 2027 (1972) affirmed the three judge district court decision of Strange v. James, 323 F.Supp. 123 (Dist. Ct. Kans., 1971) which struck down the Kansas recoupment law, however, on other constitutional grounds. This Court specifically stated that it did not reach the constitutional question on which the lower Court decided the case. The amended recoupment law left intact all of the provisions that the three judge district court found objectionable, none of the standards of the Fuller case are met, and the Court below feels totally at liberty to disregard the Fuller case.

This situation has given rise to at least four other cases challenging the validity of the amended Kansas recoupment law which are now pend-



ing in various stages in Kansas trial and appellate courts, one of which is a federal class action. A decision in this case will resolve this litigation. Recoupment laws of various types are in effect in approximately 17 states and there is a federal recoupment law. A decision in this case will clarify whether those laws must be enforced in accordance with Fuller standards, whether notice and a hearing are necessary before entering a recoupment order, and whether a state can recoup despite estoppel and violation of civil rights defenses.

This Court will face the above important unresolved issues and in addition, the Court for the first time will face the issue of whether there are any limits to denial of fees to counsel on appointive cases when the prosecution is unlawful. Furthermore, this Court will face the issue of whether a law that permits the state to profit from its own wrong from an unwilling participant or victim, is in violation of the due process clause. It is difficult to imagine a case that would bring all of these important issues into clearer focus.

This Court should review not only the opinion of the Kansas Supreme Court, but all questions within the scope of petitioner's statement of questions presented for review as set forth in the Petition for Writ of Certiorari and fairly presented by the record. The Court should specifically include in its review the most recent Judicial Administrator's judgment and also the previous judgments, all entered without hearings and none being subject to appeal because they are not judgments of a court. K.S.A. §60-2101. Furthermore, the Court below reviewed the constitutional issues raised by these judgments and held that the judgments were valid. This Court should also review the fee request denials since the Court below decided that such denials are final and not subject to judicial

review.

For the foregoing reasons, as well as those urged in the Petition, certiorari should be granted.

Dated this 3rd day of October, 1978.

Respectfully submitted,

*Levi H. Goossen*

Levi H. Goossen  
224 East 7th, P.O. Box 725  
Newton, Kansas 67114  
(316) 283-3628  
Attorney for Petitioner